No. 76-6194

FILED
JUL 19 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

PETER RINALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
HENRY WALKER,
Attorneys,

Department of Justice,
Washington, D. C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-6194

PETER RINALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

1. During the winter of 1972, petitioner and several others conspired to rob the safety deposit boxes of the Doral Beach Hotel in Miami Beach, Florida (In re Washington, 544 F. 2d 203, 205 (C.A. 5). The plot was discovered by two undercover Miami policemen who, while posing as corrupt security guards, had been solicited by the conspirators to participate in the robbery (ibid.). The evidence against petitioner showed that he attended one of the meetings at which the robbery was planned. Scaldeferri v. State, 294 So.2d 407 (Fla. App.), certiorari denied sub nom. Pompeo v. State, 303 So.2d 21 (Fla.), certiorari denied sub nom. Washington v. Florida, 419 U.S. 993.

Petitioner and his confederates were arrested in February 1973 and were charged with a number of state offenses arising out of the Doral robbery scheme. In May 1973, he was convicted in state court of conspiracy to commit robbery, conspiracy

to commit grand larceny, and carrying a concealed weapon. (Scaldeferri, supra, 294 So.2d at 408). He was sentenced to concurrent terms of five years' imprisonment on the conspiracy counts and a consecutive term of one year's imprisonment on the weapons count (Rinaldi v. State, No. 73-2075, Dade County Circuit Court, Florida). 1/

In the meantime, in March 1973, an indictment was returned in the United States District Court for the Southern District of Florida, charging petitioner and eight others with conspiracy to affect interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951 (United States v. Washington, 390 F. Supp. 842 (S.D. Fla.)). This indictment was based on the same criminal conduct which had resulted in petitioner's state convictions. After petitioner's first federal trial ended in a mistrial, the district court extensively questioned the government prosecutor about the need for the separate federal prosecution in light of petitioner's state convictions (id. at 843). The prosecutor, a member of the Organized Crime Strike Force of the Department of Justice, informed the court that his superiors in Washington, D.C. were "adamant" that the federal prosecution proceed because there was grave concern that petitioner's state convictions might be reversed on appeal. The government attorney also stated that he had been specifically instructed to prosecute the matter "to the hilt" and not to accept an offer, which at least one of the defendants made, to plead guilty in exchange for a federal sentence concurrent with the state sentence (ibid.).

1/ On the State's confession of error, petitioner's conviction for conspiracy to commit grant larceny was reversed on appeal. Scaldeferri v. State, supra, 294 So.2d at 410-411.

In a second jury trial, petitioner and co-defendants Isaac Washington, Richard Pearson, and Pasquale Sole were convicted of the Hobbs Act violation. Petitioner was sentenced to 12 years' imprisonment, with the recommendation that the term run concurrently with his state sentence (id. at 844).

2. Petitioner's federal indictment had not been authorized as required by Department of Justice procedures. Since 1959, the Department has followed the so-called Petite policy of not bringing federal charges following a state prosecution of a defendant for the same act or acts "unless the reasons are compelling." Requests for authorization to prosecute in such situations must be submitted to an Assistant Attorney General and must receive the personal approval of the Attorney General. 2/

On August 2, 1974, while an appeal from their federal convictions was pending, petitioner and co-defendant Sole asked the court of appeals to apply the Department of Justice's policy of not "trying a person a second time on essentially the same charges that were the subject of a state prosecution unless there is compelling new evidence that should be presented." This motion prompted the government's appellate counsel to inquire into the background of petitioner's federal prosecution. This inquiry disclosed that the Department's procedures had not been followed in this case. Upon further consideration within the Department of Justice, it was determined that there were no compelling reasons to justify retroactive authorization of petitioner's prosecution.

2/ This policy was first announced by Attorney General William Rogers on April 6, 1959 in a memorandum to all United States Attorneys and a simultaneously-issued press release:

> After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling. * * * [N]o federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.

While the "Petite policy" (see Petite v. United States, 361 U.S. 529) has never been incorporated into specific guidelines or regulations, the Department has regularly brought it to the attention of the United States Attorneys.

The Assistant Attorney General in charge of the Criminal Division accordingly instructed the attorneys handling the appeal to seek a remand of the case to the district court to allow the government to move to dimiss the indictment. 3/

On September 30, 1974, pursuant to this directive, the government asked the court of appeals to remand the case to enable the government to seek dismissal of the indictment. The court of appeals did so.

The government then filed in the district court, under Rule 48(a) of the Federal Rules of Criminal Procedure, a motion to dismiss the indictment. The district court denied the motion. Noting that petitioner and his co-defendants had received substantially longer sentences in federal than in state court, which was "indicative of the court's perception of the gravity of the offenses and the necessity for commensurate sanctions" (United States v. Washington, supra, 390 F. Supp. at 844), and being concerned about the unjustified waste of judicial resources caused by the government's differing postures taken in the case, the district court concluded that vacation of the defendants' federal convictions would not be in the public interest.

Although on appeal the government urged the court of appeals to direct dismissal of the indictment, that court, sitting en banc, affirmed the district court's ruling by a vote of 7 to 6 (Pet. App.). 4/

3/ See Croucher v. United States, No. 75-1884, vacated and remanded to permit the government to move to dismiss the indictment, January 10, 1977; Watts v. United States, 422 U.S. 1032; Ackerson v. United States, 419 U.S. 1099; Hayles v. United States, 419 U.S. 892; Thompson v. United States, 400 U.S. 17; Marakar v. United States, 370 U.S. 723.

4/ Co-defendant Sole is now deceased and co-defendant Washington has not petitioned for a writ of certiorari. Since co-defendant Pearson had not been prosecuted in state court, his case was severed from the others on appeal. His conviction was subsequently affirmed. United States v. Pearson, 508 F. 2d 595 (C.A. 5), certiorari denied, 423 U.S. 845.

DISCUSSION

1. The Department of Justice formulated the Petite policy in response to two decisions of this Court upholding the power of state and federal governments each to prosecute for the same crime. Bartkus v. Illinois, 359 U.S. 121; Abbate v. United States, 359 U.S. 187. In Bartkus the Court warned that courts would have "little sympathy" with the arbitrary exercise of the dual prosecution power by the federal government (359 U.S. at 137-138). To reassure the Court and others that this would not occur, then Attorney General Rogers promptly responded with a formal statement of Departmental policy. "[A]s the Court has clearly indicated," he said, "those of us charged with law enforcement responsibilities have a particular duty to act wisely with self-restraint in this area" (Rogers Memorandum 3).

Both the Court's expression of concern and the Attorney General's response reflected fundamental policies of criminal law enforcement. 5/ Since 1820, this Court has shown a continuing sensitivity to the possibility of unfairness resulting from successive state and federal prosecutions. 6/ More recently, Justices of this Court have expressed concern over the use of federal power in areas of criminal law traditionally reserved to the states. See Screws v. United States, 325 U.S. 91,

5/ Speaking for a unanimous Court in Lanza v. United States, 260 U.S. 277, Mr. Chief Justice Taft quoted from Fox v. Ohio, 5 How. 410, 434 (at 383):

> It is almost certain, that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.

6/ See, e.g., Houston v. Moore, 5 Wheat. 1, 72 (Story, J., dissenting); Moore v. Illinois, 14 How. 13, 21 (McLean, J., dissenting); California v. Zook, 336 U.S. 725, 740 (Frankfurter, Jr., dissenting); Abbate v. United States, supra, 359 U.S. at 202 (Black, J., dissenting); cf., Pennsylvania v. Nelson, 350 U.S. 497, 501-510.

138-160, Roberts, J., dissenting; Bartkus v. Illinois, supra, 359 U.S. at 137; see also Rewis v. United States, 410 U.S. 808, 811-812; Huddleston v. United States, 415 U.S. 814, 832, n. 11.

Thus, the Petite policy 7/ was adopted only after considered reflection prompted in large measure by this Court's repeated expression of concern that the dual prosecution power not result in unfairness. 8/ As the government pointed out in its memorandum in Petite, the protection of the public interest is the shared responsibility of both the courts and the executive branch, but "in all cases its effectuation necessarily depends primarily upon the judgment and good faith of the responsible government officials" (Respondents Motion to Vacate the Judgment and Dismiss the Indictment, 9). See Young v. United States, 315 U.S. 257, 258.

In almost all cases involving successive state and federal prosecutions, the Petite policy is enforced prior to indictment and

7/ At the heart of the policy announced by Attorney General Rogers was the statement:

> It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect, the Court said that although the rule of the Lanza case is sound law, enforcement officers should use care in applying it.
>
> Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely it is a rule that is in the public interest. Consequently -- as the Court clearly indicated -- those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

8/ The government will move to dismiss the indictment only if the defendant has suffered actual prejudice because of the federal prosecution and has been sentenced to a term longer than or consecutive to the state sentence. Nevertheless, the Solicitor General will inform the Court if the federal prosecution was brought in violation of the Petite policy. See Memorandum for the United States in Opposition, Lawrence v. Henderson, certiorari denied, 423 U.S. 818.

its application is not subject to judicial review (see United States v. Hutul, 416 F. 2d 607 (C.A. 7)). Inevitably, however, prosecutions will occur in violation of the policy. When that happens and the error is discovered, it is the unwavering practice of the government to attempt to correct the error. This is such a case.

2. Both courts below denied the government's motion to dismiss the indictment because Department officials allegedly misled the district court about the Department's intention concerning petitioner's prosecution. Whether correct or not, these allegations of misconduct are irrelevant. 9/ The proper inquiry, as in Petite, is whether dismissal of the indictment is "just under the circumstances" (28 U.S.C. 2106). See Marshall v. United States, 360 U.S. 310; McNabb v. United States, 318 U.S. 332. We submit that it is.

9/ As Judge Hill in dissent below perceptively stated (544 F. 2d at 210-211):

> The majority attributes the bad faith of government counsel in persisting with the prosecution to the ultimate action of government counsel in moving for the dismissal of the indictment. It seems to me that this bad faith is misapplied. I submit that, insofar as here pertinent, the first time that government counsel acted in good faith was when the government moved that the indictment be dismissed. That is, in what has been determined and, indeed, confessed to have been bad faith, the government persisted in a prosecution and obtained, as a result of that bad faith, convictions. The majority holds today that, in order not to "invite future misconduct by the Government," we insist that the government be rewarded with the very convictions that it obtained through bad faith prosecutions and, we deny government counsel the right at long last to recant and in good faith dismiss the indictment. There must be logic in this result or the majority would not have so held, but I must confess that it escapes me.

The interests of justice and the encouragement of local responsibility in law enforcement are just as compelling at the appellate level as before indictment. No action by the Department or the Court can now replace the waste of judicial and prosecutorial resources expended in obtaining petitioner's conviction. On the other hand, no societal interest would be vindicated by punishing further a defendant who has already been convicted and has received a substantial sentence in state court and who, the Department has determined, should not have been prosecuted by the federal government.

The majority of the court of appeals concluded that the district court had not abused its discretion in refusing to dimiss the indictment because (1) the government had taken inconsistent positions in this case and (2) the district court imposed a heavier sentence than the state sentence, which the court considered inadequate. Although the district court has some discretion under Rule 48(a) of the Rules of Criminal Procedure to deny a government motion to dismiss an indictment, the discretion is narrow. See United States v. Cowan, 524 F. 2d 504, 513 (C.A. 5). It does not justify refusal to dismiss under the Petite policy, which involves the unique situation where, had the Department of Justice properly reviewed the matter prior to prosecution, there would have been no indictment. In that circumstance, the refusal of the district court to dismiss after trial an indictment which, under the government's settled policy, should never have been brought, cannot be sustained as a proper exercise of discretion.

In these circumstances, the United States believes it would be appropriate for the Court summarily to vacate the judgment of the court of appeals and remand the case to the district court with instructions to dismiss the indictment. See Petite v. United States, supra, 361 U.S. at 529; Marakar v. United States, 370 U.S. 723; see also Redmond v. United States, 384 U.S. 264. 10/

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
HENRY WALKER,
Attorneys.

JULY 1977.

10/ If the Court grants the petition and sets the case for plenary review, the Solicitor General, in accordance with the position the Department of Justice took in the court of appeals, does not intend to defend the judgment of the court of appeals.